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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

IBRAHIM ABRAHAM MOHAMED,

Defendant and Appellant.

D060595

(Super. Ct. No. SCE11131)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Judge. Affirmed as modified.

A jury convicted Ibrahim Abraham Mohamed of corporal injury to a spouse or roommate (Pen. Code,¹ § 273.5, subd. (a)) and one count of false imprisonment by violence, menace, fraud or deceit (§§ 236 & 237, subd. (a)). Appellant was granted probation with certain terms and conditions.

Appellant appeals contending the court should have held a "*Marsden* hearing" (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) even without a specific request and

¹ All further statutory references are to the Penal Code unless otherwise specified.

that the court erred in imposing probation conditions which required Appellant to obtain the probation officer's permission to either change his residence or place of employment. We find nothing in this record which would have required the trial court to hold a hearing under *Marsden*. We do find, however, that the probation condition, which is challenged, is constitutionally overbroad. Accordingly, we will affirm the convictions but modify the probation order by striking the challenged condition.

Since Appellant does not challenge either the admissibility or sufficiency of the evidence to support his convictions, we will omit the traditional statement of facts. To the extent any factual background is relevant to the analysis of the contentions in this appeal we will discuss such facts in the discussion section of this opinion.

DISCUSSION

I

THE TRIAL COURT WAS NOT REQUIRED TO HOLD A MARSDEN HEARING

Following his convictions, but prior to sentencing Appellant sent the following letter to the trial judge:

"Dear Judge:

". . . I believe your [sic] a fair and just person and that [A]merica is true to justice. I just don't understand if it was supposed to be that way, why did my attorney chose not to represent me properly. I thought it was your innocent till proven guilty, the way it seemed was I was guilty from the start. My attorney was too busy trying to prove me guilty instead of trying to prove me innocence [sic]. My attorney and the district attorney knowingly with held [sic] information that would have proved my innocence. I am not saying you['re] a bad judge and I am not questioning your decision. I just wish that you would look into this so other innocent people don't have to go through what I had to. All the proof is located in the

Discovery package of my case. I really would appreciate it if you took the time to look it over because I feel everything is in it to prove me innocent. The facts to prove [sic] me innocent are in the pages 18, 23, 25, 27-30, 34, 37 and 39-40.

"Thank you for taking the time to listen to me. Everything I have said is sincerely [sic] from my heart."

At the time of sentencing the trial judge acknowledged receipt of the letter, but made no further comment on it. Appellant did not request that his appointed counsel be replaced nor did appointed counsel suggest that Appellant had expressed any interest in replacement counsel. Appellant now claims, for the first time on appeal, that he wanted his counsel replaced and that the trial court was obligated to conduct such a hearing without any further specific request from Appellant. We find nothing in this record to give rise to a duty on the part of the trial judge to conduct a *Marsden* hearing.

A. Legal Principles

When a defendant requests a trial court to replace appointed counsel, the court must provide the defendant with the opportunity to explain why defense counsel's performance is inadequate or why the attorney-client relationship has deteriorated. (*Marsden, supra*, 2 Cal.3d 118, 124.) While a formal request to replace counsel is not required, the defendant must provide some "clear indication" that he or she wants to have counsel replaced. (*People v. Mendoza* (2000) 24 Cal.4th 130, 157.) Trial courts have a duty under the *Marsden* rule to conduct a hearing where there is some clear indication of a desire to replace counsel, but trial courts are not required to be clairvoyant or to be aware of a defendant's unexpressed wishes. There must be some evidence in the record

from which the trial judge could reasonably deduce that a defendant actually wants to replace defense counsel. (*People v. Dickey* (2005) 35 Cal.4th 882, 920-921.)

B. Analysis

Appellant contends his letter was sufficient notice to the trial court of his dissatisfaction with appointed counsel to require the court to make some follow-up effort to determine if Appellant wanted to replace counsel and then to conduct an appropriate *Marsden* hearing. However, a trial court is not required to conduct a *Marsden* hearing on the court's own motion. (*People v. Martinez* (2009) 47 Cal.4th 339, 421.) The court is only required to take action where there is some "clear indication" that a defendant desires to replace appointed counsel.

The purpose of the *Marsden* procedure is to provide defendants with an opportunity to address the court, out of the presence of the public, to explain the problem that is potentially interfering with effective representation by counsel. The procedure does not place the trial court in the position of being the monitor of the attorney-client relationship. Thus, there must be something in the record that would cause a reasonable trial judge to understand that there is an issue with the representation by appointed counsel.

Applying these principles to this case, we find nothing in Appellant's letter to the court that would, without any further comment from the Appellant, cause the trial judge to know that a *Marsden* motion was being requested. The letter complains about defense counsel, and the prosecutor. The essence of the complaint is Appellant's claim of innocence, which he alleges is demonstrated by the "discovery package." Appellant's

specific request was: "I really would appreciate it if you took the time to look it over because I feel everything is in it to prove me innocent. The facts to proof [sic] me innocent are in the pages"

It is obvious the "it" referred to in the request is the "discovery package." Appellant pointed out the specific pages in the material he wished the court to review to demonstrate his innocence. Respectfully nothing in this request even remotely indicates that Appellant wished to replace his attorney. While his letter hints at a conspiracy by the prosecutor and the defense counsel, it appears to be in the nature of "background" for Appellant's request for the court to independently review the evidence to support his conviction.² The letter does not request a hearing, does not request a new attorney and does not contain any material that would reasonably put a judge on notice that Appellant was interested in such action. The trial court did not commit error by failing to conduct a *Marsden* hearing on its own motion.

II

THE PROBATION CONDITIONS

In granting probation to Appellant the court imposed a number of conditions. One of the orally imposed conditions was that: "He is to obtain his probation officer's approval as to residence and employment." Although Appellant did not object to this condition in the trial court he now contends the condition is unconstitutionally overbroad.

² Appellant does not contend the trial court erred in failing to address his claim of innocence prior to sentencing. Nor does Appellant raise any claim of innocence on appeal.

The People acknowledge that since the challenge presents a pure question of law, it may be raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888.)

We agree the issue is properly before us and will address it on the merits.

Sentencing courts have broad discretion in imposing conditions of probation meant to protect the public and rehabilitate the defendant. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A defendant may refuse probation if he believes the conditions are too harsh. (*In re Bushman* (1970) 1 Cal.3d 767, 776, overruled on another ground in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) Accepting probation, however, does not prevent a defendant from then challenging conditions of that probation on appeal. (*Bushman, supra*, at p. 776.)

We review probation conditions for abuse of discretion. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1121.) A probation condition is invalid if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality" (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *People v. Lent, supra*, 15 Cal.3d 481, 486.) All three parts of this test must be satisfied before a reviewing court will invalidate a condition of probation. (*Olguin, supra*, at p. 379.)

A. Requirement to Obtain Permission Before Changing Residence or Employment

In *People v. Bauer* (1989) 211 Cal.App.3d 937, the defendant was convicted of false imprisonment and assault and was placed on probation. One probation condition was that he "obtain his probation officer's approval of his residence" (*Id.* at p. 940.)

The defendant argued that the condition was not related to his crime or his rehabilitation and unreasonably infringed on his constitutional rights. (*Ibid.*) The *Bauer* court agreed, holding that nothing in the record indicated the defendant's home life contributed to his crimes or was reasonably related to his future criminality, and his residence was not in itself criminal. (*Id.* at p. 944.) The court noted that the condition was especially disturbing because it infringed on the defendant's constitutional rights of travel and freedom of association and gave the probation officer too much discretionary power over the defendant's living situation. (*Ibid.*)

In *People v. Burden* (1988) 205 Cal.App.3d 1277, the defendant pleaded guilty to writing checks with insufficient funds and was placed on probation with several conditions, including prohibiting him from working in a sales position. (*Id.* at p. 1279.) The *Burden* court noted that a sales position might give the defendant the opportunity to misrepresent his financial status or write checks while claiming that he would soon receive a large commission. (*Id.* at p. 1280.) However, because there was nothing in the record to indicate the defendant had used those tactics in the past, the court held the restriction to the defendant's constitutional right to employment was overbroad and should be stricken. (*Id.* at pp. 1280-1281.)

Similarly here, there is nothing in the record referring to Appellant's living situation or indicating that it contributed to his current or past offenses. Nor does the record show Appellant intended to change his residence, thus providing no indication of an intention to move to a location which would contribute to his future criminality. Likewise, nothing in the record links Appellant's employment to his criminal behavior,

nor is there an indication he intends to find employment somewhere that could facilitate such continued behavior.

The People argue that the residence and employment approval conditions are reasonably linked to Appellant's rehabilitation because of Appellant's prior juvenile history of theft related crimes. They claim the conditions would make it easier for the probation officer to maintain supervision of Appellant. This argument is speculative and there is no basis in the record to infer that Appellant has the intention of living or working in a location that would encourage him to engage in criminal activity. Although there is no reason to believe the probation officer would abuse the authority to deny Appellant permission to move or change employment, that alone does not permit the court to unnecessarily limit Appellant's rights. (*People v. Bauer, supra*, 211 Cal.App.3d at p. 944.)

While Appellant's probation officer has an interest in knowing the location of Appellant's residence and place of employment, the unchallenged requirement that Appellant notify his probation officer within 72 hours of any change of address or employment satisfies that interest. Therefore, the requirement that Appellant obtain probation officer approval before changing his residence or employment is, in this case, overbroad. The requirement improperly impedes Appellant's right to travel, his freedom of association and his right to employment. It also gives too much discretionary control to the probation officer. For these reasons, and because the restriction applies to conduct that is not criminal, we strike the probation condition requiring Appellant to obtain approval from his probation officer before changing his residence or employment.

DISPOSITION

The probation condition requiring probation approval of Appellant's employment and residence is stricken. In all other respects, the judgment is affirmed. The superior court is directed to amend the probation order in accordance with the views expressed in this opinion.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.